No. 14688

United States
COURT OF APPEALS
for the Ninth Circuit

NELSON EQUIPMENT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES RUBBER COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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Appeal from the United States District Court for the District of Oregon.

I

TO APPELLANT'S FIRST ASSIGNMENT OF ERROR

POINTS AND AUTHORITIES

1. When parties to a contract of sale agree that the quality shall be determined by the inspection of a third party, such inspection is conclusive in the absence of fraud, collusion or bad faith.

Pacific Commercial Co. v. Greer (Dist. Ct. of Ap., Cal., 1933), 19 P. 2d 543.

Amos v. Walter N. Kelley Co. (Mich., 1927), 215 N.W. 397.
Federal Grain Co. v. Hayes Grain & Commission Co. (Ark., 1923), 255 S.W. 307.
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Gorham v. Dallas, C. & S. W. Ry. Co. (Tex., 1907), 106 S.W. 930.
Field v. Descalzi (Pa., 1923), 120 Atl. 113.

2. When the buyer does not rely upon the seller's skill or judgment there is no implied warranty as to fitness.

ORS 75.150 (1).
Pacific Commercial Co. v. Greer (Dist. Ct. of Ap., Cal., 1933), 19 P. 2d 543.

3. Uncontradicted testimony need not be followed if inherently improbable, or if disproved by physical facts.

Quock Ting v. United States, 1891, 140 U.S. 417, 35 L. Ed. 501, 11 Sup. Ct. 733.
Grace Bros., Inc. v. Commissioner of Internal Revenue (CA 9, 1949), 173 F. 2d 170.

4. Unless clearly erroneous, the findings of the trial court are conclusive.

Fed. Rules of Civil Proc., Rule 52 (a).

ARGUMENT

(a) The assignment raises an abstract question.

The trial court found there was no implied warranty because the contract called for inspection by Under-

writers' Laboratories, Inc. and such inspection, in the absence of fraud, collusion or bad faith, was conclusive. Appellant's first assignment of error attacks this finding. Said assignment raises a purely abstract question which is not in any way determinative of this appeal for the following two reasons:

(1) Appellant's second assignment of error appears to rely upon a mutual, contractual rescission rather than a unilateral rescission for breach of warranty. If our understanding of appellant's ground for rescission (as above stated), is correct, then the question whether or not an implied warranty existed becomes wholly immaterial because a contractual rescission is not at all dependant upon the existence of a warranty and, further, because appellant is not relying upon a breach of warranty as the ground for its rescission.

(2) The trial court found that even if there were an implied warranty as to quality, appellant failed to prove a breach thereof (Tr. 24, 28).

The finding that the hose was of good quality is predicated upon substantial and credible testimony and on physical facts. Appellee's claim agent, Hellegers, and an inspector from Underwriters' Laboratories, Inc., McNabb, each testified (Tr. 21, 22), that in the damaged areas the hose was dirty and the threads were abraded and scuffed, all of which indicate that the damage was caused by the hose rubbing against another object; that if the damage had been due to defects the breaks in the thread would have been clean breaks. The trial court relied upon this testimony, on photographs and

on the admitted fact that every section of hose, when received by the City of Seattle, was examined for defects and none were found. The damage occurred after the hose had been in the possession of the Seattle Fire Department and handled by them.

The finding of the trial court that the hose, when delivered, was not defective and was fit for its intended use, must be accepted on this appeal. This finding, alone, fully disposes of appellant's first assignment of error.

(b) On the merits.

The City of Seattle purchase order required "each and every section [of the hose] to bear label of Underwriters' Laboratories, Inc." (Tr. 10). The only factor considered by the City of Seattle in determining whose bid to accept was price (Tr. 12).

Label of Underwriters' Laboratories, Inc. denotes that the hose was manufactured according to certain minimum standards (Tr. 19) and that it was subjected to various tests designed to determine the fitness, quality and performance of the hose (Tr. 20).

As required by the purchase order, every section of hose involved in this case was so tested by a representative of Underwriters' Laboratories, Inc., was found satisfactory, and a label was affixed thereto in evidence thereof (Tr. 11, 22).

It is firmly established that where the parties agree that quality shall be determined by inspection of a third

party, such inspection, whether expressly made so or not, is conclusive. The foregoing facts bring the case within this rule, as indicated by the following authorities:

In *Pacific Commercial Co. v. Greer* (Cal., 1933), 19 P. 2d 543, plaintiff ordered wire rope from defendant, requiring same to be inspected by Hunt & Co., who made the inspection and enclosed its certificates in evidence thereof. As to the conclusive effect of the inspection the court said (19 P. 2d 545):

> "Each of appellant's orders contained the requirement that the rope should be inspected by Hunt & Co. This inspection was made before the delivery of the rope. Therefore appellant did not rely upon respondent's judgment of the quality or length of said rope, but, on the contrary, upon the inspection made by Hunt & Co.
>
> "In California Sugar, etc., Agency v. Penoyar, 167 Cal. 274, 279, 139 P. 671, 673, the court said: 'Nothing is better settled than the rule that where the parties agree that the performance or non-performance of the terms of a contract, or the quantity, price or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding, in the absence of fraud or mistake' ".

In *Amos v. Walter N. Kelley Co.* (Mich., 1927), 215 N.W. 397, defendant ordered lumber of certain specifications with inspection to be made by a lumber association. Nothing in the contract was said as to the conclusive effect of the inspection but the court held that, having been agreed upon, it was binding on both parties. The court said (215 N.W. at p. 399):

"In the instant case inspection by an inspector of the National Hardwood Association was agreed upon. In Walter N. Kelley Co. v. Andrews, 225 Mich. 403, 196 N.W. 407, it was said by Mr. Justice Sharpe, speaking for the court: 'The purpose of agreeing on an inspector is to prevent disputes arising after shipment. In the absence of fraud or mistake, the result of the inspection made by a man agreed upon is conclusive between the parties'.

"There is no testimony tending to show fraud or mistake of the inspector, and the inspection was binding on the parties."

In *Federal Grain Co. v. Hayes Grain & Commission Co.* (Ark., 1923), 255 S.W. 307, the purchase order designated No. 3 oats at "Kansas City grades and weights". The oats were inspected at Kansas City by a state inspector and were certified as No. 3 oats. Plaintiff brought action for breach of warranty because when the oats arrived at Little Rock, Arkansas they were found to be No. 4 oats by a federal inspector. The court held that plaintiff, having called for a Kansas City inspection was bound thereby unless the results of the inspection were procured by fraud or bad faith.

To like effect is *Citizens, Independent Mill and Elevator Co. v. Perkins* (Okl., 1915), 152 Pac. 443, where the court gave a conclusive effect to an inspection made pursuant to a purchase order reciting "Your weights and Wichita grades".

In *Gorham v. Dallas, C. & S. W. Ry. Co.* (Tex., 1907), 106 S.W. 930, the contract provided "material to be subject to Hunt's inspection at buyer's cost". The court said (106 S.W. p. 933):

> "The effect of this phrase in the contract was to constitute Hunt or Hunt & Co., in the matter of inspecting the material, the agent of both parties, and was conclusive on them, unless there was bad faith in the matter of inspection."

In *Field v. Descalzi* (Pa., 1923), 120 Atl. 113, the purchase order required "state inspection". In giving conclusive effect to the inspection made pursuant thereto, the court said (120 Atl. at p. 114):

> "He may by contract provide the manner in which the examination shall be made, and, when he does so, is concluded by his stipulation. So, it may be agreed that the approval of some third party shall be deemed sufficient, and, when this is pronounced in good faith, the vendee will be bound by the decision given (citing cases) . . .
>
> * * *
>
> " . . . legislation was passed in Texas, governing the standards of tomato packs within its jurisdiction, and a duly appointed officer was directed to exercise the proper supervision, and issue an official certificate showing the true state of facts. There can be no doubt that it was this investigation which was referred to in the telegrams between the parties in the present case. To hold otherwise would render meaningless the contention appearing therein of 'state inspection'. This was made, and the certificate, offered upon the trial, showed the goods at the place of loading conformed to the offer accepted. In the absence of some proof that the inspector acted fraudulently, or in collusion with the vendor, *his approval was correctly treated as conclusive* . . ." (Italics supplied)

Under the Uniform Sales Act, there is an implied warranty as to fitness only when "it appears that the buyer relies on the seller's skill or judgment". ORS 75.150 (1).

The City of Seattle placed no reliance upon its seller's skill or judgment, as the only factor which it considered was price (Tr. 12). Therefore, under the express provisions of the Uniform Sales Act, and as held in *Pacific Commercial Co. v. Greer,* supra, the inspection rather than the seller's judgment having been relied upon, there can be no implied warranty as to fitness, and the City of Seattle could not have rescinded from appellant.

Appellant cannot rescind from appellee unless the City of Seattle had a right to rescind as against appellant. *Vanderpool v. Burkitt,* 113 Or. 656, 234 Pac. 289.

(c) Answer to appellant's argument.

At page 7 of its brief appellant argues that inspection of a third party is binding only where such party is the buyer's agent and that Underwriters' Laboratories was not the agent of the City of Seattle in the inspection of the hose.

Appellee disagrees with that contention. The City of Seattle, having designated Underwriters' Laboratories, and it only, to inspect and certify, the City of Seattle thereby constituted Underwriters' Laboratories as its agent for that purpose.

Next, appellant cites the following named cases, which are distinguishable on the following grounds:

Smith v. Great Atlantic and Pacific Tea Co., 170 F. 2d 474:

1. The subject matter, spinach, was inspected and certified *before* the sale, and the seller's offer expressly

warranted inspected and certified spinach. An inspection under these circumstances is clearly not binding on a subsequent buyer.

2. The inspection was only of "some of the cans in each lot (12 in one and 9 in the other)" and "it was not disclosed what tests were made by him," whereas in the case at bar, each and every section of hose was examined and fully tested, and the tests were fully described and disclosed in the brochure referred to in the written decision of the trial court (Tr. 23) and entitled "Standard for Cotton Rubber Lined Fire Hose".

Barrett Co. v. Panther Rubber Mfg. Co., 24 F. 2d 329, and *Willig v. Brethauer* (Cal.), 274 P. 2d 202: neither of these cases involves inspection by a third party, and in both the buyers were relying upon the skill, judgment and representations of the seller, whereas in the case at bar the City of Seattle relied solely upon the inspection of Underwriters' Laboratories, Inc., and it placed no reliance upon the skill or judgment of appellant or appellee.

Commencing at page 10 of its brief, appellant attacks the finding of the trial court that the hose was of good quality when delivered and that the damage resulted from misuse while in the hands of the City of Seattle. Appellant argues that this finding is based upon inference, that appellant's evidence is uncontradicted to the effect that the hose was not misused while in the possession of the City of Seattle, and appellant then concludes with the point that the inference is dissipated by the uncontradicted evidence.

The only evidence offered by appellant as to the use to which the hose was subjected was through the witness Anderson. His testimony covered the period April 30 to May 9, 1952, and pertained to the 48 sections delivered to Engine Co. 18 (Tr. 15). No evidence was offered as to the use to which this same hose was subjected between the date of its receipt on April 8, 1952 and until April 30, 1952 nor was any evidence offered as to the use to which the remaining 48 sections delivered to Engline Co. 6 were subjected from the date of its receipt on April 8, 1952 until its return on Jan. 23, 1953.

The physical facts are that in the areas of damage the hose was dirty and individual strands of thread were torn, indicating that the damage occurred as a result of the hose rubbing against another object. Photographs of the damage were received in evidence and referred to in the decision of the trial judge. Both appellee's claim agent and an inspector of Underwriters' Laboratories, Inc., each an expert as to all matters pertaining to fire hose, testified that in their opinion the damage was caused from friction and mishandling and that there were no defects in the hose itself because, if there had been, the breaks in the cotton jacket would have been clean breaks instead of tears in individual strands (Tr. 21, 22).

It is to be concluded from the evidence:

1. The hose, when received by the City of Seattle, was carefully inspected by it, was found to be free of any defects, and was accepted.

2. The damages to the hose occurred after it came into the possession of the City of Seattle.

3. Except for the period April 30 to May 10, 1952 covering 48 sections only, there is no evidence as to the manner in which the hose was handled by the City of Seattle.

4. The physical condition of the hose when returned to appellee indicates that the damage occurred as a result of mishandling.

There is no basis for rejecting the finding of the trial court to the effect that the hose was of good quality when delivered. Anderson's testimony, even if uncontradicted, was inadequate and was disproved by the physical facts.

II

TO SECOND ASSIGNMENT OF ERROR

POINTS AND AUTHORITIES

1. An agreement to rescind is itself a contract and like any other contract it requires an offer and acceptance.

12 Am. Jur. 1011 (Contracts, Sec. 431).

2. In order to rescind for breach of warranty, a buyer must act promptly upon discovery of the breach, by notifying a seller of his intention to rescind and by returning or offering to return the purchased property. An

unreasonable delay in so doing precludes rescission and constitutes an affirmance of the contract.

ORS 75.690 (3).
3 Williston on Sales, 350 (Revised Edition).
Anno. 72 ALR 726, 772 to 784.

3. The receipt and retention by seller of merchandise returned by a buyer does not imply an agreement to rescind.

Jackson v. Miles F. Bixler Co. (Miss., 1930), 127 So. 270.
J. B. Colt Co. v. Hayenga (S.D., 1927), 217 N.W. 187.

ARGUMENT

On April 29, 1952, 48 sections of the hose were delivered to Engine Company 6 and on April 30, the remaining 48 sections were delivered to Engine Company 18 (Tr. 12). On May 10, 1952, 37 of said sections at Engine Company 18 were discovered to be damaged and on May 27 were returned to appellant (Tr. 12, 13).

On September 23, 1952, the 48 sections delivered to Engine Company 6 were inspected and 22 sections were found damaged (Tr. 14).

The decision of the City of Seattle to rescind was based entirely and solely upon the damage in the 37 sections discovered in May and upon the inspection made on September 23 (Tr. 14). However, all the hose, save only the 37 sections returned in May, were kept in use and service by the City of Seattle until January 23, 1953, which was four months after the final inspection of September 23rd.

It is axiomatic that in order to rescind for breach of warranty the buyer must return or offer to return all the property promptly upon discovery of the breach, and that any delay in returning the property, and particularly continuing to use it constitutes an affirmance of the contract and precludes the buyer from rescinding. Authorities in support thereof appear under appellee's Point 2 above.

Appellant, apparently recognizing the impossibility of establishing a timely rescission under the Uniform Sales Act, makes no attempt to even do so but instead contends that under the facts appellant and appellee mutually agreed to rescind the contract. A mutual rescission is itself a contract and like any other contract requires an offer and acceptance.

> "However, to have the effect of discharging a contract, an agreement of rescission must be a valid agreement. Two minds are required to change the terms and conditions of a contract after it is executed. As a contract is made by the joint will of two parties, it can be rescinded only by the joint will of the two parties. It is obvious that one of the parties can no more rescind the contract, without the other's express or implied assent than he alone can make it." 12 Am. Jur. 1011 (Contracts, Section 431).

Appellant contends that appellee agreed to rescind by accepting a return of the hose and paying for the freight charges thereon. In considering this question, it is important to note that we are dealing with a fully executed contract. Appellee had delivered the goods almost a year before they were returned to it. Appellant had paid for them at that time. On January 23, 1953,

appellant shipped the goods back to appellee and by February 23, 1953 appellant was indebted to appellee in the sum of $3,387.96 on other items for which appellee billed appellant monthly (Tr. 9). This, in and of itself, negatives any implication that appellee intended to receive the goods for credit, for in order that there be a mutual rescission it would be essential for appellee to agree to return the purchase price. There is nothing whatsoever in the record to indicate that, by accepting a return of the goods for the purpose of testing them to see whether the claim of defect in manufacture was well founded, appellee agreed to pay for them if it did not find them to have been of defective manufacture. It was appellee's practice to inspect all goods returned for claimed defects and to act in accordance with its inspection (Tr. 18).

The inspection was made on March 13, 1953 by a representative of Underwriters' Laboratories, Inc. (Tr. 22). Appellee was notified by letter from Underwriters' Laboratories dated April 10, 1953 of the result of this inspection and on May 1, 1953 appellee wrote appellant advising it thereof and that there were no defects in manufacturing. Both of said letters were offered and received in evidence. There is nothing in these facts to create an implication that appellee agreed to pay for the goods when they were returned and yet that is the only way a contractual rescission could take place. Acceptance of a return shipment by the seller does not imply an agreement to rescind. *Jackson v. Miles F. Bixler Co.* (Miss., 1930), 127 So. 270; *J. B. Colt Co. v. Hayenga* (S.D., 1927), 217 N.W. 187.

Appellant cites *Gray v. Mitchell,* 145 Or. 519, 28 P. 2d 631, for the proposition that a mutual rescission may be established by conduct and that where a vendee declares an intention to rescind it is incumbent upon the vendor either to affirm or disaffirm.

While in the case of an executory contract, as in *Gray v. Mitchell,* supra, it may be incumbent upon a vendor to make an election after the vendee declares an intent to rescind, this most certainly is not true in the case of a fully executed contract, as in the case at bar.

An examination of *Gray v. Mitchell,* supra, reveals that same involved an executory contract of sale of real property and said contract provided for forfeiture in the event of breach by the vendee. When in that case, the vendor received the keys from the vendee after breach, there was nothing further to be done to consummate the termination of the contract and, consequently, an intent to consider the contract at an end under and pursuant to the forfeiture provision thereof could be inferred. Here, however, there was necessarily another factor in a rescission of the contract, as evidenced by appellant's counterclaim herein, to-wit, the return of the purchase price; and at no time did appellee, by accepting a return for inspection, imply that it intended to refund the price. No such implication, of course, was necessary in the *Gray* case. Here not only did it not exist, but it was expressly dissipated even had it existed, by the monthly statements which appellee addressed to appellant demanding payment of the balance for which appellee recovered judgment herein.

On pages 14 and 15 of appellee's brief it asserts that the hose was retained after the April, 1953 inspection by the appellee for its own purposes and that it gave no notice to appellant of appellee's refusal to accept a return of the hose.

In making this contention, appellant overlooks completely said letter of May 1, 1953 received in evidence as Exhibit "36", in which the most unequivocal terms, appellee advised appellant there were no defects in the hose.

Appellee's claim agent, Mr. Hellegers, testified (Tr. 21) that he continued to hold the hose until August, 1953 when he transferred it to appellee's warehouse as customer's property.

Following its receipt of the May 1 letter, appellant was fully aware that appellee would not return the purchase price and that the hose was held as appellant's property. Yet, appellant made no effort to secure a return of the hose and appellee was under no duty to do anything other than store same for appellant until it received further instructions as to appellant's wishes.

CONCLUSION

Appellant's assignment of error to the trial court's finding that there was no implied warranty raises a purely abstract question because (1) appellant does not base its rescission on breach of warranty, and (2) the trial court found that even if there were an implied warranty as to quality there was no breach thereof as the hose, when delivered, was free of defects and of good quality. This latter finding is supported by substantial, credible evidence and should not be disturbed on appeal.

A mutual rescission, like any other contract, requires mutual assent. In order for mutual rescission to exist appellant must show that appellee agreed to retake the hose and return the purchase price. The evidence establishes the contrary, namely, that appellee refused to refund the purchase price or to retake the hose.

The Seattle fire department having retained the hose in service and use until January 23, 1953, which was four months after its final inspection resulting in its decision to return the hose, the City of Seattle and the appellant were precluded from rescinding even if they had grounds therefor. The retention and use of the hose either voluntarily by the city, or at the request of appellant at least four months after the defects were discovered, constitutes affirmance of the contract as a matter of law.

Appellant apparently recognizes its inability, for the foregoing reasons, to assert rescission based upon breach of warranty and therefore has, instead, attempted to

base same upon a mutual agreement to rescind. But appellant's contention for mutual rescission is unsupportable as a matter of law under the facts of this case.

Respectfully submitted,

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